Supreme Court, U.S.
FILED
051570 APR 8 - 2006
OFFICE OF THE CLERK

No. ——

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

DARYOUSH DANIAL,
PETITIONER,

-versus-

HOMA D. DANIELS,
RESPONDENT.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, Jolly, Davis, & Owen, Circuit Judges

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, and to what extent, interest may be included in determining the jurisdictional amount in controversy for purpose of 28 U.S.C. § 1332(a)?

ARGUMENT FOR GRANT OF CERTIORARI

The Courts of Appeal are in conflict regarding the issue whether interest may be included in determining the minimum jurisdictional amount under 28 U.S.C. § 1332(a). Moreover, the decision of the Fifth Circuit Court of Appeals in this case is arguably in conflict with the precedent set by the Court.

OPINION BELOW

The unpublished opinion of the U.S. Court of Appeals for the Fifth Circuit under review is *Danial v. Daniels*, No. 05-10846.

JURISDICTION OF THIS COURT

The panel judgment of the U.S. Court of Appeals under review was filed January 9, 2006. US Code title 28, § 1254(1), confers jurisdiction upon the Court to decide this appeal on certiorari.

STATUTE INVOLVED IN THE CASE

US Code title 28, § 1332(a) provides, in pertinent parts, that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state."

STATEMENT OF THE CASE

Petitioner Daryoush Danial is a citizen of Iran. Shortly after the 1979 revolution, the government of Islamic Republic of Iran placed a travel ban on Petitioner.

In June 1980 Daryoush Danial sent a sum total of $76,125 to Respondent Homa Daniels in the United States for safekeeping. Daryoush Danial instructed Homa Daniels to deposit the funds in an

account that pays the highest rate of interest. Instead of keeping the funds in the account, Homa Daniels invested the funds in her own real estate business and treated the principal and the real estate gains as her own.

In August 1987 Homa Daniels telephoned Daryoush Danial. During that conversation Homa Daniels claimed that the entire principal had been lost in "the stock market crash of 1980."[1]

Daryoush Danial recovered some of the principal from Homa Daniels. But, the outstanding principal balance plus interest that would have accrued through August 1987 (*i.e.*, the date of the phone call) is about $77,600.[2]

In 1999 the government of Iran lifted the travel ban on Daryoush Danial. In 2001 Daryoush Danial obtained a visa and traveled to the United States for the first time. Daryoush Danial filed suit in federal district court on January 14, 2005,[3] alleging breach of fiduciary duty and breach of trust.[4]

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[1] The panel opinion, quoting our appellate briefs, states that the phone call took place in August 1990. Our appellate briefs, however, state that the call took place in August 1987.

[2] We calculated this amount based on historical interest rates for three-month certificates of deposit, which we obtained from Federal Reserve Bank's website (http://www.federalreserve.gov/releases/H15). The outstanding balance of $77,600 exceeds the minimum jurisdictional amount of $50,000 that was in effect in 1990, when the last recovery took place. The inflation-adjusted 2005 value of $77,600 is about $116,000, calculated using the Inflation Calculator available at the U.S. Department of Labor's website (http://www.bls.gov/cpi). Under Texas law, inflation can be taken into account in determining the amount of damages. The Court of Appeals did not opine on the issue whether inflation can be taken into account for purpose of determining the jurisdictional amount in controversy. Rather, the panel opinion simply states that there is ". . . no evidence of an acceptable measure of inflation . . ." (this is so even though Respondent Homa Daniels has not challenged our calculation of inflation). Even if inflation cannot be taken into account, the outstanding balance of $77,600 (*i.e.*, the outstanding balance not adjusted for inflation) still exceeds $75,000, the minimum jurisdictional amount that was in effect in 2005 when the suit was filed.

[3] The statute of limitation is tolled to January 18, 2001, the date of the email from Homa Daniels in which she clearly and unequivocally acknowledged the debt and made a promised to pay. The panel decision asserts that "the two-year statute of

The complaint's claim of jurisdiction rests on 28 U.S.C. § 1332(a), which grants federal jurisdiction in all civil actions where the matter in controversy exceeds $75,000 and where the action is between a citizen of a State and a citizen of a foreign state. The District Court opined that no interest should be taken into account for purpose of determining the minimum jurisdictional amount in this case. The District Court concluded that the minimum jurisdictional amount is not satisfied and dismissed the case. The Court of Appeals affirmed.[5]

ARGUMENT FOR GRANT OF CERTIORARI

US Code title 28, § 1332(a) excludes interest for purpose of determining whether the matter in controversy exceeds the minimum jurisdictional amount of $75,000. Congress intended to exclude interest from the calculation of the jurisdictional amount in controversy to avoid plaintiffs deliberately delaying the filing of the suit in order to accumulate the requisite amount in controversy.

But, not all interest is excluded. Specifically, interest is includable in computing the jurisdictional amount if the interest is not merely incidental or accessory to the principal amount demanded, but

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limitations" has run. But, under Texas law the statute of limitation for breach of fiduciary duty is clearly four years. See TEX. CIV. PRAC. & REM. CODE § 16.004 (2005). In any event, the limitation issue was not properly before the Court of Appeals because the District Court did not rule on it.

[4] There is an issue whether breach of express trust was properly plead in the complaint. But, this issue is inconsequential for purpose of this petition. Compensatory damages are calculated the same way under either a breach of trust or a breach of fiduciary duty theory of liability. Breach of fiduciary duty was properly plead in the complaint.

[5] Circuit Judge Pricilla Owen was one of the judges that rendered the unpublished panel opinion. We requested that Judge Owen recuse herself in this case because Judge Owen may be acquainted with Respondent Homa Daniels's son. Both Judge Owen and the son have been active and visible members of the Texas Chapter of Federalist Society for many years. Moreover, Judge Owen and the son have both served as legal counsel to Enron and other Texas energy companies.

constitutes an integral part of the aggregate amount of damages claimed. *Brown v. Webster*, 156 U.S. 328, 330 (1895); *Edwards v. Bates County*, 163 U.S. 269, 272 (1896).

Under Texas law, one measure of damages for breach of fiduciary duty or breach of trust is: the outstanding principal balance, plus profits (here interest) that would have been earned but for the breach.[6] Given the policy behind 28 U.S.C. § 1332(a) (to avoid plaintiffs deliberately delaying the filing of the suit in order to accumulate the requisite amount in controversy), and given the Court's decisions in *Brown* and *Edwards*, we would have thought that here the interest that would have accrued through August 1987 (*i.e.*, the date of the phone call, and the date when the cause of action was triggered[7]) should be included in determining the jurisdictional amount in controversy.

An opinion of the Fourth Circuit confirms our logic. Specifically, in *Starlet v. Nationasbank of Virginia*, 886 F. Supp. 1285 (1995), the Fourth Circuit held that the express exclusion of interest in 28 U.S.C. § 1332(a) does not refer to the interest that the trust principal would have earned were it not for defendant's breach of trust. The court included such interest in determining the jurisdictional amount in controversy.

Some Circuits have questioned whether *Brown* is still good law. Clarification of the technical issue that is before the Court would provide greater certainty to litigants who contemplate bringing action in federal courts. Moreover, such clarification would simplify the task before federal judges who may be presented with this issue in the

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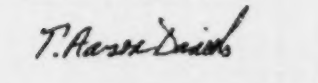
[6] Another measure of damages under a breach of fiduciary duty or a breach of trust theory of liability is: outstanding principal balance, plus actual gains made through the breach (*e.g.*, the real estate gains made by Homa Daniels in this case). The complaint and our subsequent court filings clearly put the courts below on notice of the significant real estate gains that Homa Daniels made through the breach. But, the courts below ignored the real estate gains in determining the amount in controversy. The opinions of the District Court and the Court of Appeals do not even mention the real estate gains.

[7] Under Texas law, a breach of fiduciary duty or a breach of trust cause of action accrues when the plaintiff knows or should have known of the breach.

future. In short, guidance from the Court would facilitate the administration of justice by providing a greater degree of legal certainty on this threshold federal question.

RESPECTFULLY,



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Calculation of principal plus interest that would have accrued through August 1987 15

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED

No. 05-10846
Summary Calendar

January 9, 2006

DARYOUSH DANIAL,

Plaintiff - Appellant

versus

HOMA D. DANIELS,

Defendant - Appellee.

Appeal from the United States District Court for
the Northern District of Texas, Dallas Division
No. 3:05-CV-90

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:[8]

Daryoush Danial appeals the district court's order dismissing his complaint. Reviewing the district court's dismissal for lack of jurisdiction de novo, Calhoun County, Tex. v. United States, 132 F.3d 1100, 1103 (5th Cir. 1998), we affirm for the reasons stated by the district court, including the following:

1. The party seeking federal jurisdiction bears the burden of establishing that jurisdiction exists. See St. Paul Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998). Here, the claim of federal jurisdiction rests on diversity jurisdiction under 28 U.S.C. § 1332. Even assuming the parties are diverse, federal courts

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[8] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

only have jurisdiction where "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." Id. To determine if the amount in controversy requirement is met we look first to the plaintiff's complaint. See St. Paul Mercury Indem. Co. v. Red Cab Co., 58 S.Ct. 586, 590 (1938) ("[I]f from the face of the pleadings, it is apparent, to a legal certainty, . . . that the plaintiff never was entitled to recover that amount, . . . the suit will be dismissed."). Danial's complaint alleges that he sent his sister, Homa Daniels, $76,125 in 1980 to hold on Danial's behalf. The complaint goes on to acknowledge that by the time of suit Daniels had repaid $69,625. Thus from the face of the complaint the total and undisputed amount owing is $6,500. This falls far short of the required amount in controversy.[2]

2. Danial's contention that the inclusion of costs helps him to reach the minimum jurisdictional amount is misplaced. By its very language § 1332(a) clearly excludes costs from the calculation of the amount in controversy. Thus, the district court was not in error to exclude costs from its calculation.

3. Danial's calculation of and reliance on interest, although creative, is also without merit. Interest is only considered for jurisdictional purposes where it is a basis for the suit itself. Brown v. Webster, 15 S.Ct. 377 (1895); see also Greene County v. Kortrecht, 81 F. 241 (5th Cir. 1897) (holding that interest on a note prior to maturity would be properly considered as a part of the amount in controversy although interest accruing after maturity would not). The basis of this suit does not involve interest and as such the district

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[2] The unpaid amount claimed on appeal by Danial is far different – $77,600. This amount is reached by arguing that the conveyance by Danial to Daniels created a constructive or resulting trust under "Texas trust law" and then performing a series of creative calculations of interest. However, the Texas law of trusts, contained in the Texas Property Code, specifically excludes both constructive and resulting trusts. See TEX. PROP. CODE § 111.003 (2005) ("a 'trust' is an express trust only and does not include: (1) a resulting trust; [or] (2) a constructive trust"). Thus the district court correctly recognized that the potential liability of Daniels to Danial is for the return of the outstanding balance of $6,500. Additionally, because Danial's reliance on the creation of a trust under Texas law is misplaced, his arguments relating to the breach of certain trustee duties are also without merit.

court was proper to exclude it from the determination of the amount in controversy.[3]

4. Danial contends that "punitive damages of $175,000 should be reasonable under the facts of this case." Although the amount is mentioned in his appellate brief, Danial failed to even request punitive damages in his initial complaint. It was only in his response to Daniels's motion to dismiss that punitive damages were requested at all. Because no amount of punitive damages was requested below, the amount of punitive damages requested does not rise to the level of legal certainty required for inclusion in the jurisdictional calculation. See St. Paul Mercury Indem. Co., 58 S.Ct. at 590.

4. While Danial claims that inflation helps to cure his amount in controversy shortcomings, there is no evidence that this argument was raised below. Further, there is no evidence of an acceptable measure of inflation that would cause the remaining amount due to rise to the $75,000 required by § 1332.

5. Danial's claim for attorney's fees likewise falls short. Danial's son has not appeared in this action on behalf of his father. Rather, Danial has been pro se in this action. Attorney's fees are not available to a non-attorney pro se litigant. See McLean v. Int'l. Harvester Co., 902 F.2d 372, 373 (5th Cir. 1990).[4] As Danial has not been represented by counsel nor demonstrated that he is an attorney, attorney's fees are not available to him.

6. Even were this claim not jurisdictionally barred, dismissal would be appropriate as the action is barred by the statute of limitations. The complaint acknowledges that Daniels told Danial in

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[3] Additionally we note that even were we to include interest in our calculation, the amount in controversy -- $6,500 plus interest -- would still fall far short of the minimum jurisdictional requirement.

[4] Even if attorney's fees were available to Danial, they would not make up the $68,500 necessary to reach the minimum jurisdictional amount.

a phone call in 1986 that the money had been lost.[5] Even assuming, as Danial alleges, that equitable tolling was applicable due to either the fraud of Daniels or Danial's inability to travel to the United States, the statute of limitations ran long before the filing of this suit and thus this action is barred.[6]

For these reasons the district court did not err in dismissing Danial's complaint for lack of jurisdiction, and the order of the district court is thus,

AFFIRMED.

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[5] Danial's appellate brief asserts that this call took place in August 1990. Under either date the applicable statute of limitations has run.

[6] The complaint states that Danial discussed filing suit against his sister as early as 1989-1993. Thus any fraud inducing him to believe no claim existed was, by Danial's own admission, ineffective by that date. Further, the travel restrictions between Iran and the United States were lifted in 1999. Further, Danial states that it was possible for him to obtain a visa to enter the United States in August 2001. Assuming that equitable tolling applied until those restrictions were lifted, the two-year statute of limitations ran long before the filing of the complaint on January 14, 2005. See TEX. CIV. PRAC. & REM. CODE § 16.003 (2005).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DARYOUSH DANIAL,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
V.	§	3:05-CV-0090-K
	§	
HOMA D. DANIELS	§	
	§	
Defendant.	§	

ORDER

Before the Court is Defendant Homa D. Daniels' Motion to Dismiss the Complaint of Plaintiff Daryoush Danial. The Court cannot properly exercise jurisdiction on the basis of diversity of citizenship in this case because the case does not involve an amount in controversy of at least $75,000, therefore the Defendant's Motion to Dismiss for lack of subject matter jurisdiction is **GRANTED**.

I. Background

Plaintiff's petition asserts claims for breach of fiduciary duty, indebtedness resulting from conversion, violation of the Texas Theft Liability Act, Tex. Civ. Proc. & Rem. Code § 134.001 et seq., and indebtedness arising from the Defendant's written acknowledgment. Basically, Plaintiff is suing his sister on a twenty-five year old debt. Assuming Plaintiff's alleged facts are true, in 1980 Plaintiff sent $76,125 to his sister, Defendant Homa Daniels, to hold and invest on his behalf. Plaintiff alleges that instead of investing the money as he directed, Homa Daniels treated the money as her own. Undisputed is

the fact that the Defendant has repaid $69,625 of the allegedly owed $76,125 over the years.

II. Legal Standard

Plaintiff alleges no federal constitutional or statutory basis for his claim. Therefore, the only basis for federal jurisdiction is diversity of citizenship. Assuming that the parties are diverse, the Court shall have diversity jurisdiction "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). The burden of establishing federal subject matter jurisdiction rests on the party seeking to invoke it. *See St. Paul Reinsurance Co., Ltd. V. Greenberg,* 134 F.3d 1250, 1253 (5th Cir. 1998). In determining the amount in controversy, the court must look to the amount of damages claimed by the plaintiff in good faith. *See Allen v. R & H Oil & Gas Co.,* 63 F.3d 1326, 1335 (5th Cir. 1995). However, the court should look to the actual amount in controversy, not just the damages claimed. *See Diefenthal v. C.A.B.,* 681 F.2d 1039, 1052 (5th Cir. 1982)(court would be remiss in accepting every damage claim at face value no matter how trivial the underlying injury).

III. Amount in Controversy

While Plaintiff Daryoush Danial contends in his response to Defendant's Motion to Dismiss that the amount in controversy exceeds $75,000, the most the Court can glean from the Plaintiff's complaint is substantially less than the requisite amount. The Plaintiff acknowledges in his pleadings that the Defendant has repayed $69,625 of the original debt; thus, only $6,500 of the debt remains outstanding. Plaintiff argues that this amount combined with interest, costs, and punitive damages exceeds the $75,000 minimum jurisdictional amount.

Section 1332(a) clearly excludes costs, and interest is excluded unless it is an essential ingredient of the plaintiff's principal claim. *See Brown v. Webster,* 156 U.S. 328, 330 (1895). Interest is excluded in this case under the rule of *Brown v. Webster* because it is

only incidental to the matter and it is not the basis of the suit. *See Greene County v. Korttrecht,* 81 F. 241 (5th Cir. 1897)(holding interest on a note prior to maturity is part of the amount in controversy even though interest accruing after maturity would not be). Punitive damages are properly considered in determining whether the jurisdictional minimum has been met. *See St. Paul Reinsurance,* 134 F3d at 1253 (h lding "items to be considered in ascertaining the amount in controversy when the insurer could be liable for those sums under state law are *inter alia* penalties, statutory damages, and punitive damages—just not interest or costs"). The Plaintiff does not allege punitive damages in his complaint. The Plaintiff first mentions punitive damages in his response to Defendant's Motion to Dismiss, however, he never discusses how much they would be. Even if it is assumed that all of Plaintiff's alleged damages, punitive damages and attorney's fees are recoverable, the Court finds that the total claim does not exceed $75,000. Concluding that the Court does not have subject matter jurisdiction in this case because the requisite amount in controversy has not been met, the Defendant's Motion to Dismiss is hereby **GRANTED**. The Plaintiff's Motion to Amend to allege additional facts regarding the citizenship of the parties is **DENIED** as futile.

SO ORDERED.
Signed June 13th, 2005

ED KINKEADE
UNITED STATES DISTRICT JUDGE

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this *title [28 USCS § 1603(a)]*, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335 [*28 USCS § 1335*], and *section 1441* [*28 USCS § 1441*], an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Calculation of Outstanding Principal Balance Plus Interest That Would Have Accrued Through August 1987 (the Date of the Call) Had There Been No Breach of Trust

Year	Annual Rate[1]	Beginning Balance	Less	Sub-Total	Interest[2]	End of Year Balance
1980	13.02%	**76,125**		76,125	4,956	81,081
1981	15.93%	81,081		81,081	12,916	93,997
1982	12.27%	93,997		93,997	11,533	105,530
1983	9.07%	105,530	(10,000)	95,530	8,665	104,195
1984	10.39%	104,195	(20,000)	84,195	8,748	92,943
1985	8.04%	92,943		92,943	7,473	100,415
1986	6.51%	100,415		100,415	6,537	106,952
8/1987	6.87%	106,952		106,952	4,286	111,239
12/31/87		111,239	(6,000)	105,239		105,239
1988		111,239	(5,225)	106,014		106,014
1989		106,014	(5,000)	101,014		101,014
1990		101,014	(23,400)	77,614		**77,614**

[1] Historical rates on 3-month CDs obtained from the Federal Reserve Bank's website (http://www.federalreserve.gov/releases/H15).

[2] Assumes interest is compounded annually. Bank interest is in fact compounded monthly.